

120 FERC ¶ 61,276
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Wind Capital Holdings, LLC

Docket No. ER07-1208-000

ORDER GRANTING MARKET-BASED RATE AUTHORIZATION AND
ORDERING REFUNDS

(Issued September 25, 2007)

1. Wind Capital Holdings, LLC (Wind Capital) filed an application requesting Commission authorization to engage in wholesale sales of electric energy and capacity at market-based rates.¹ Wind Capital also requests that the Commission grant such waivers and blanket authorizations as it has granted to other sellers of wholesale power that do not have a franchised service territory, and that the Commission waive the prior notice requirement and make such market-based rate authorization effective as of July 28, 2007, one day after filing.

Background

2. Wind Capital states that it owns and operates a 56.7 MW (nameplate) small power production facility (the facility) near King City, Missouri in Gentry County. Wind

¹ We note that the Commission has recently revised and codified in the Commission's regulations the standards pertaining to market-based rates. *See Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252 (2007). Given that Wind Capital filed its application prior to the effective date of Order No. 697, the Commission will examine the application based on the market-based rate analysis in effect at that time. However, Wind Capital is reminded that it will be subject to any applicable regulations upon their effective date.

Capital is located within the Associated Electric Cooperative, Inc. (AECI) control area. Wind Capital has self certified that the facility is a qualifying facility (QF) under the Public Utility Regulatory Policies Act of 1978, as amended (PURPA).² Wind Capital states that, as a QF, in particular a qualifying small power production facility with a power production capacity which exceeds 30 megawatts (MW), it is not exempt from the Federal Power Act (FPA), including section 205.³

3. Wind Capital states that it has sold test energy to AECI during the testing and commissioning of its facilities. Nevertheless, Wind Capital states that it did not seek market-based rate authority and did not have a rate on file prior to July 27, 2007, when it filed the subject application, because it was not immediately aware that Order No. 671 eliminated the exemption for QFs with capacity over 30 MW from certain provisions of the FPA.⁴

Wind Capital Application

4. Wind Capital states that it is 99 percent owned by John Deere Renewables, LLC, which is owned by Deere & Company, a Delaware corporation and 1 percent owned by Wind Capital Group, LLC, which is wholly owned by an individual. Wind Capital is affiliated with two other wind facilities within AECI that are expected to be operational in late 2007.⁵ Wind Capital states that neither it nor any of its affiliates is directly or indirectly engaged in the generation or sale of electric power in the United States except

² Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §§ 2601-2645 (1978).

³ Wind Capital July 27, 2007, Application for Market-Based Rates, Certain Waivers, Blanket Authorizations and Request for Expedited Consideration (Wind Capital Application) at 2, 15 (citing 18 C.F.R. § 292.601(b) (2007); *Mendota Hills LLC*, 110 FERC ¶ 61,222, at P 4, n.5 (2005)).

⁴ *Revised Regulations Governing Small Power Production and Cogeneration Facilities*, Order No. 671, 71 Fed. Reg. 7852 (2006), FERC Stats. & Regs. ¶ 31,203 (2006).

⁵ Wind Capital states that these facilities are named Cow Branch, LLC and CR Clearing, LLC and that each facility has a 50.4 MW nameplate capacity. Wind Capital also included in its analysis the capacity from a 5 MW wind generating facility being developed by one of its affiliates in Missouri even though the facility is still in the construction phase and has not yet begun testing, commissioning or operating. *See* Wind Capital Application at 4-5.

electric power generated from qualifying cogeneration or small power production facilities.

5. As detailed below, Wind Capital states that neither it nor its affiliates has generation or transmission market power or the ability to erect barriers to entry and that they do not engage in affiliate abuse or reciprocal dealing.

6. As referenced above, Wind Capital requests waiver of the prior notice requirement, stating that it only recently became aware that its ongoing daily sales into the AECI control area were subject to FPA section 205. Accordingly, Wind Capital requests the Commission to grant a waiver for the 60-day prior notice requirement to become effective one day after filing.

7. In addition to its request for waiver of the prior notice requirement, Wind Capital seeks the same waivers previously granted to other sellers permitted to sell at market-based rates. Specifically, Wind Capital requests: (1) waiver of 18 C.F.R. Parts 41, 101 and 141 of the Commission's accounting and reporting regulations, with the exception of 18 C.F.R. §§ 141.14 and 141.15 ; (2) waiver of the Commission's regulations regarding the filing of information in Subparts B and C of 18 C.F.R. Part 35, except for 18 C.F.R. §§ 35.12(a), 35.13(b), 35.15, and 35.16; (3) blanket authorization under section 204 of the FPA and 18 C.F.R. Part 34 of all future issuances of securities and assumptions of liability; and (4) waiver of such other regulations that the Commission previously has waived at the request of other entities authorized to sell energy at market-based rates.

8. Wind Capital also submitted its proposed wholesale market-based rate tariff providing for sales of capacity and energy.⁶

Notice of Filing and Responsive Pleadings

9. Notice of Wind Capital's July 27, 2007 filing was published in the *Federal Register*, 72 Fed. Reg. 44,505 (2007), with comments, protests or interventions due on or before August 16, 2007. None were filed.

⁶ FERC Electric Tariff, Original Volume No. 1, Original Sheet No. 1.

Discussion**A. Market-Based Rate Authorization**

10. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. The Commission also considers whether there is evidence of affiliate abuse or reciprocal dealing.⁷ As discussed below, we find that Wind Capital's proposed market-based rate tariff meets these standards. Accordingly, we will accept the proposed tariff for filing, without suspension or hearing, to become effective July 28, 2007, as requested.

1. Generation Market Power

11. Wind Capital states that construction of the facility and the two affiliated facilities within AECl commenced after July 9, 1996. In addition, even assuming that all of their capacity is fully uncommitted, Wind Capital states that it still passes both the pivotal supplier and market share screens and therefore it and its affiliates do not possess market power in generation.⁸ Accordingly, Wind Capital's submittal satisfies the Commission's requirements regarding generation market power for this control area.⁹

2. Transmission Market Power

12. Wind Capital claims that it does not have market power in transmission because neither it nor its affiliates own or control any transmission facilities other than incidental interconnection facilities for its plants to interconnect to the grid.¹⁰ Wind Capital's

⁷ See, e.g., *Progress Power Marketing, Inc.*, 76 FERC ¶ 61,155, at 61,919 (1996); *Northwest Power Marketing Co., L.L.C.*, 75 FERC ¶ 61,281, at 61,899 (1996); accord *Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223, at 62,062-63 (1994).

⁸ Wind Capital Application at 7-8.

⁹ 18 C.F.R. § 35.27(a) (2007). We note, effective September 18, 2007, Order No. 697 eliminates this exemption, and Wind Capital and its affiliates as of the effective date of Order No. 697 are required to follow the procedures set forth in Order No. 697, FERC Stats. & Regs. ¶ 31,252.

¹⁰ Wind Capital Application at 11.

representation satisfies the Commission's transmission market power standard for approval of market-based rate authority.

3. Barriers to Entry

13. Wind Capital also claims neither Wind Capital nor any of its affiliates own or control any facilities or resources that could be used to restrict market entry by competing power suppliers, markets, or brokers. Wind Capital also states that neither it nor its affiliates control any significant power generation construction sites, fuel supplies, fuel supply transportation facilities or other essential resources or inputs that could be used to restrict market entry of any competitors.¹¹ Based on these representations, Wind Capital satisfies the Commission's market-based rate standard with respect to barriers to entry.

4. Affiliate Abuse

14. Wind Capital states that neither it nor any of its affiliates is affiliated with an electric utility with a franchised service territory and therefore its application does not raise any issues with respect to affiliate abuse or reciprocal dealing.¹² Based on this representation, the Commission is satisfied that Wind Capital's filing does not raise affiliate abuse concerns.

5. Other Waivers, Authorizations, and Reporting Requirements

15. Wind Capital requests the following waivers and authorizations: (1) waiver of Subparts B and C of Part 35 of the Commission's regulations requiring the filing of cost-of-service information, except as to §§ 35.12(a), 35.13(b), 35.15, and 35.16; (2) waiver of Parts 41, 101, and 141 of the Commission's accounting and periodic reporting requirements; and (3) blanket authorization under Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability.

16. The Commission will grant the requested waivers and authorizations consistent with those granted other entities with market-based rate authorizations. Notwithstanding the waiver of the accounting and reporting requirements here, the Commission expects Wind Capital to keep its accounting records in accordance with generally accepted accounting principles.

¹¹ *Id.* at 13.

¹² *Id.*

17. Wind Capital is required to file Electric Quarterly Reports (EQRs) in compliance with Order No. 2001.¹³ If the effective date of its market-based rate tariff falls within a quarter of the year that has already expired, its EQRs for the expired quarter are due within 30 days of the date of this order.

18. Wind Capital is directed to file an updated market power analysis pursuant to the regional schedule adopted in Order No. 697.¹⁴ The Commission also reserves the right to require such an analysis at any intervening time.

B. Waiver of the Prior Notice Requirement

19. Wind Capital requests waiver of the Commission's prior notice requirement. Wind Capital's facility currently is undergoing commissioning and testing to prepare for full commercial operation, which is expected by the fourth quarter of 2007. During the testing process, some of the individual wind turbine generators have generated test energy that was transmitted to the transmission grid and purchased by AECl. As of March 17, 2006, the effective date of Order No. 671, such sales require Commission approval.

20. The Commission will grant Wind Capital's request for waiver of the prior notice requirement to allow its market-based rate tariff to become effective July 28, 2007. Wind Capital submits that it is a small QF without market power and that waiver should be granted to allow it to make authorized energy and capacity sales. We find good cause to grant Wind Capital's request to waive the 60-day prior notice requirement in this case.¹⁵

¹³ *Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127 (2002), *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reh'g denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *order directing filing*, Order No. 2001-C, 101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 102 FERC ¶ 61,334 (2003).

¹⁴ To the extent that Wind Capital believes it falls within the newly established definition of "Category 1" sellers that will be exempt under Order No. 697 from the requirement to automatically submit updated market power analyses, it should make a filing with the Commission at the time that an updated market power analysis for its relevant market would otherwise be due. That filing should explain why it meets the Category 1 criteria. *See* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 849.

¹⁵ *Central Hudson Gas & Electric Corporation*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992).

21. With respect to the unauthorized power sales of test energy made by Wind Capital prior to the effective date of Wind Capital's market-based rate authorization, the Commission will require Wind Capital to refund to its customers the time value of the revenues collected, calculated pursuant to 18 C.F.R. § 35.19a of the Commission's regulations¹⁶ for the entire period that the rate was collected without Commission authorization.¹⁷ In addition to returning the time value of the revenues collected for the period the rate was charged without Commission authorization, when dealing with market-based rates that are not timely filed, the Commission also has stated that:

The utility will be required to refund all revenues resulting from the difference, if any, between the market-based rate and the cost-justified rate. . . . The late-filing utility will receive the equivalent of a cost-based rate, less the time value remedy applicable to the unauthorized filing of cost-based rates, until the date of Commission authorization.¹⁸

22. For a QF like Wind Capital, the difference between the market-based rate and the cost-justified rate would be the difference between the market-based rate and its avoided cost rate (or, if it has no such avoided cost rate, a reasonable proxy for such rate).¹⁹ Wind Capital should identify its avoided-cost rate in its refund report ordered below (or, if it has no such avoided cost rate, a reasonable proxy for such rate). Whether or not an individual customer actually suffered any harm, we add, is irrelevant to our inquiry here. The injury being remedied by refunds for late filing is not merely redress for that customer but particularly "the Commission's ability to enforce FPA section 205's requirement that there be prior notice and that the rates charged be just and reasonable at

¹⁶ 18 C.F.R. § 35.19a (2007).

¹⁷ *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 at 61,980, *order on reh'g*, 65 FERC ¶ 61,081 (1993).

¹⁸ *Id.*; *see also* 16 U.S.C. § 825h (2000), *Southern California Water Co.*, 106 FERC ¶ 61,305, at P 15-16, *reh'g denied*, 108 FERC ¶ 61,168 (2004). *See also Public Service Co. of Colorado*, 85 FERC ¶ 61,146, at 61,588 (1998); *Carolina Power & Light Co.*, 87 FERC ¶ 61,083, at 61,356 (1999) (*Carolina Power*).

¹⁹ 18 C.F.R. § 292.304(a) (2007); *Mendota Hills*, 110 FERC ¶ 61,222 at P 26 (2005).

the time they are being charged.”²⁰ Therefore, we conclude that refunds, plus interest, are due.

The Commission orders:

(A) Wind Capital’s market-based rate tariff is hereby accepted for filing, effective July 28, 2007, as discussed in the body of this order.

(B) Waiver of the provisions of Subparts B and C of Part 35 of the Commission’s regulations, with the exception of 18 C.F.R. §§ 35.12(a), 35.13(b), 35.15 and 35.16, is hereby granted.

(C) Waiver of Parts 41, 101, and 141 of the Commission’s regulations is hereby granted, with the exception of 18 C.F.R. §§ 141.14, 141.15 (2007).

(D) Within 30 days of the date of issuance of this order, any person desiring to be heard or to protest the Commission’s blanket approval of issuances of securities or assumptions of liabilities by Wind Capital should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. §§ 385.211 and 385.214 (2007).

(E) Absent a request to be heard within the period set forth above, Wind Capital is hereby authorized to issue securities and assume obligations or liabilities as guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issue or assumption is for some lawful object within the corporate purposes of Wind Capital, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

(F) The Commission reserves the right to modify this order to require a further showing that neither the public nor private interests will be adversely affected by continued Commission approval of Wind Capital’s issuances of securities or assumptions of liabilities.

(G) Wind Capital’s request for waiver of the prior notice requirement is granted, as discussed in the body of this order.

²⁰ *El Paso Electric Company*, 105 FERC ¶ 61,131 at P 21 (2003) (footnote omitted) (citing *Carolina Power*, 87 FERC ¶ 61,083 at 61,356).

(H) Wind Capital is hereby ordered to make refunds, with interest, within 30 days of the date of this order, as discussed in the body of this order. Such refunds shall include the period that any rates were collected without Commission authorization. Wind Capital is hereby directed to submit a refund report within 30 days thereafter, regarding the basis for and calculations of the refunds paid.

(I) Wind Capital is required to file Electric Quarterly Reports (EQRs) in compliance with Order No. 2001. If the effective date of Wind Capital's market-based rate tariff falls within a quarter of the year that has already expired, Wind Capital's EQRs for the expired quarter are due within 30 days of the date of this order.

(J) Wind Capital is hereby directed to file an updated market power analysis in accordance with the regional schedule adopted in Order No. 697, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.